**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 | ) | MB Docket No. 05-311 |
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# COMMENTS OF CHARTER COMMUNICATIONS, INC.


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February 13, 2006

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## COMMENTS OF CHARTER COMMUNICATIONS, INC.

Pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned matter, Charter Communications, Inc. ("Charter") submits the following Comments.

## I. INTRODUCTION AND SUMMARY.

As local telephone companies, most prominently Verizon and AT&T (collectively the "ILECs"), roll-out their cable video offerings, they have raised various complaints regarding the longstanding local franchising process that Congress embraced in the 1984 Cable Act, arguing that it stands as a barrier to entry. As Charter's own experience demonstrates, the ILECs' claims regarding the "barrier" of local franchising are incorrect.

Some examples of the assertions advanced by the ILECs include their arguments that burdensome "legacy" franchise requirements were accepted in return for "exclusive" or "monopoly" rights to serve a franchised area;[1] that cable operators entered into "legacy"

[1] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Reply Comments of SBC Communications Inc., MB Docket No. 05-255, at 17 (October 11, 2005) ("SBC Competition Status Reply Comments").

franchise obligations years ago and therefore cable operators have had years to recover the costs of those obligations;[2] that "legacy" franchise obligations are not appropriate for a competitive market;[3] that LFA areas do not match with ILEC service areas so it is unreasonable to impose build-out and universal service obligations;[4] and that the franchising process is so time consuming and expensive that it effectively denies ILECs franchises.[5] Charter's own experience as a relatively new entrant in the multichannel video programming distribution ("MVPD") marketplace rebuts the ILECs' arguments.

The ILECs say they cannot secure several thousand franchises and upgrade their networks in a competitive environment – yet Charter did. Charter did not enter the cable market decades ago. Charter entered the cable market in earnest in the late 1990s, and has spent the last five years investing billions of dollars to upgrade its cable systems and deploy advanced broadband services in over 4,000 communities, many of them small or rural. Charter did so in the face of fierce competition. At the same time Charter was deploying its network under the

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[2] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Comments of Verizon on the Status of Competition in the Video Marketplace, MB Docket No. 05-255, at 10 (Sep. 19, 2005) ("Verizon Competition Status Comments"); *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Reply Comments of Verizon on the Status of Competition in the Video Marketplace, MB Docket No. 05-255, at 9 (Oct. 11, 2005) ("Verizon Competition Status Reply Comments").

[3] Verizon Competition Status Comments at 10; Verizon Competition Status Reply Comments at 9; *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Comments of SBC Communications, Inc., MB Docket No. 05-255, at 13-14 (Sep. 19, 2005) ("SBC Competition Status Comments").

[4] Verizon Competition Status Comments at 11-12; SBC Competition Status Reply Comments at 2-7; *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Comments of Qwest Communications, International, Inc., MB Docket No. 05-255, at 10-12, 16 (Sep. 19, 2005).

[5] Verizon Competition Status Comments at 14; SBC Competition Status Comments at 15; SBC Competition Status Reply Comments at 5.

local franchising regime of the Cable Act, DBS companies were gaining double digit market penetration and becoming the second and third largest MVPDs in the country. Contrary to the ILECs' claims, Charter's current franchise obligations were not imposed in competition-free zones, with infinite "green field" opportunities. Charter's franchise requirements were imposed in a competitive market, and under Title VI, which was adopted by Congress in 1984 specifically to address local franchising authority ("LFA") overreaching. Charter's investment was made with the understanding that the Title VI regime would apply to anyone else who decided to undertake the significant investment and risk, like Charter had.

Now, the ILECs want to be excused from the same local franchising regime. Granting their wish would significantly undermine Charter's ability to compete on a level playing field and continue to invest in advanced broadband networks and services, like telephony. The ILECs are not hapless new entrants in need of regulatory protection. They are multi-billion dollar companies, who have ubiquitous networks, established customer relationships with every home in their multi-state territories, and some of the most well known and established brands in the world. They also already have a vast infrastructure of local government affairs lobbyists and representatives, who have established relationships with local and state regulators. They are fully equipped to deal with their LFAs and are formidable competitors.

Ultimately, granting ILECs market entry free from the local franchise requirements that Charter faces would fundamentally impact Charter's ability to satisfy its existing obligations. Charter would be asked to compete, but with its hands and feet tied. Funds that Charter might use to respond to competition by investing in new facilities and competitive services, like telephony, would be tied up in franchise obligations not imposed on Charter's competitors. Indeed, the introduction of such uneven competition would undermine Charter's investment and render its franchise obligations commercially impracticable. Charter has more than once faced entry by wireline competitors who were granted more favorable franchise deals, and it had to avail itself of the franchise modification provisions of Section 625 of the Cable Act. "Franchise light" ILEC entry would similarly render Charter's current franchise obligations commercially impracticable and require that they be modified.

Charter's evidence of what can be accomplished within the rubric of Title VI cable franchising, even in the face of head-to-head competition, demonstrates that the claims of the ILECs ring hollow. Since 1998, Charter secured thousands of franchises and invested billions to rebuild its systems. In comparison, after essentially ignoring the cable market for 10 years, the ILECs now want the Commission to grant them unprecedented regulatory relief based on a handful of anecdotes about alleged LFA overreaching and supposed insurmountable burdens imposed by the local franchising process in general. The ILECs' inaccurate assertions and general distaste for local franchising are not sufficient legal or policy grounds on which the Commission can or should adopt rules that fundamentally alter an industry.

## II. CHARTER SECURED FRANCHISES AND UPGRADED ITS SYSTEMS IN A HIGHLY COMPETITIVE MARKET

The ILECs complain that they cannot possibly obtain hundreds or thousands of local franchises and upgrade their existing facilities under the current franchising conditions. Charter's own experience demonstrates that the ILECs' arguments are without merit.

Charter propelled itself into the top rung of MVPD providers through a series of acquisitions in the late 1990s and 2000 whereby it grew from approximately one million subscribers to over six million subscribers in just 18 months.[6] During its peak period of growth, Charter secured over two thousand franchise transfers with LFAs and invested several billion dollars to upgrade systems, all while subject to significant competition.

Between 1998 and 2000 alone, Charter secured franchise transfer approval from 1,417 LFAs.[7] In the past two years, Charter has negotiated over 723 franchise renewals. Charter did not receive these franchises as part of a "rubber stamped" deal in which Charter was given a free pass to green fields of exclusive market share. For example, many LFAs' consider the transfer process a significant opportunity for them to impose additional requirements on the "acquiring" cable operators, as they view themselves as having leverage over the cable operator through their ability to deny a cable system transfer or sale.[8] Accordingly, some of the concessions LFAs seek to extract from cable operators during the transfer process include commitments to modify cable system capabilities, to provide I-Net or fiber-optic set asides, to provide additional grants to support Public Educational and Government programming, to provide cash payments in settlement of ongoing disputes, or to impose various other requirements such as heightened

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[6] In late 1998 and in early 2000, Charter acquired the Marcus cable systems serving over one million subscribers. During 1999 and early 2000, in quick succession, Charter completed 12 additional acquisitions and added nearly four million additional subscribers. The 1999 acquisitions included Renaissance and 134,000 subscribers, American Cable and 69,000 subscribers, Greater Media Cablevision and 176,000 subscribers, Helicon Partners and 171,000 customers, Vista and 26,000 subscribers, Cable Satellite and 9,000 subscribers, Rifkin and 463,000 subscribers, Intermedia and 278,000 subscribers (net addition after some system swaps with other cable operators), Fanch and 528,000 subscribers, and Falcon and 955,000 subscribers, Avalon and 258,000 subscribers. Charter acquired Bresnan and its 686,000 subscribers in early 2000. *See* Charter Communications, Inc. 10-K filed March 30, 2000 at 9-12.

[7] Similarly, in the past year, Comcast and Time Warner have had to secure 1,610 transfer franchises as part of the deal involving the acquisition of Adelphia.

[8] *See, e.g.*, http://www.millervaneaton.com/feature_transfer.html.

service standards.[9] Thus, in many instances during the transfer process, Charter faced the same demands the ILECs now identify.

Charter also spent the last five years investing billions of dollars in private risk capital to upgrade and rebuild its cable systems. Since 2000, Charter has invested approximately $10.5 billion throughout the country, with the majority of the capital spent on upgrading and rebuilding its infrastructure in the local communities it serves.[10] During that time, Charter deployed approximately 34,000 miles of fiber optic lines and approximately 120,000 miles of upgraded coaxial cable. Charter's acquisitions were also not purchasing existing "monopoly" rights. Much like the ILECs propose to do today, Charter's acquisitions had provided it a presence in the public rights-of-way, but almost all of the systems had to be rebuilt to deliver state of the art broadband services, like digital video, high speed Internet access and telephony.

Charter's franchise acquisitions and system investment were all undertaken in the face of direct, significant competition. By 2000, Direct Broadcast Satellite ("DBS") providers were already firmly established as a significant and rapidly growing competitor. DBS was already available nationwide, and not only were DirecTV and Echostar aggressively marketing[11] to nearly every home in the United States, they were cutting dramatically into cable's market share.

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[9] *Id.*

[10] *See, e.g.*, Charter Communications, Inc. Form 10-K, filed Apr. 15, 2003 (for period ending Dec. 31, 2002) at 55-56 (reporting of $2.2 billion, $2.9 billion and $2.8 billion in capital expenditures just for the years ending 2002, 2001, and 2000, respectively, with the majority of capital expenditures in those years relating to rebuild and upgrades and new set-top boxes and cable modems).

[11] Some of DBS' aggressive marketing offers included free dishes, free installation, and discounted programming packages. Chris Serres, *Time Warner Offers 'Video on Demand' Service in Raleigh, N.C., Area*, News & Observer, July 6, 2002 ("The satellite companies are fighting back with free dishes, monthly discounts and more channels."). In a 2001 marketing campaign specifically directed at Charter, Echostar's DISH Network offered 115 channels for $9 per month, an additional $100 off a DISH Network TV system starting at $199. *DISH Targets*

DBS has continued to grow at a sharp pace, with DirecTV and Echostar now the second and third largest MVPD providers behind Comcast.[12] Moreover, DBS has very high penetration rates in many of the states where Charter has cable systems. For example, in Vermont, nearly 42% of MVPD customers are DBS subscribers, in Utah 38% of MVPD customers are DBS subscribers, and in Mississippi, over 33% of MVPD customers are DBS subscribers.[13] DBS' reach was and is even more extensive in rural areas, where Charter has many of its cable systems. According to a recent report, 42% of customers in rural areas subscribe to DBS while 37% are cable subscribers.[14] Even more significantly, in some communities where Charter operates, more MVPD customers subscribe to DBS service than to Charter's service. For example, in Charter's West Plains, Missouri franchise area, 48% of households subscribe to DBS service while only 37% subscribe to Charter.[15] In the face of this competition, Charter has

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*Charter in Promotion*, SkyREPORT, Oct. 8, 2001 at http://www.skyreport.com/viewskyreport.cfm?ReleaseID=687#Story1 (last accessed Feb. 8, 2006) (The $9 price was available to all new subscribers while the $100 off promotion was specifically limited to Charter subscribers). Recently, DBS retailers routinely offer $199 rebate vouchers or second receivers and free Digital Video Recorders (DVRs). *See, e.g.*, http://www.commercemarketplace.com/home/rbelanger/onhold/Free_Promotions.html and http://www.vmcsatellite.com/channels/dish_splash.cfm.

[12] *See FCC Issues 12th Annual Report To Congress On Video Competition*, News Release (Feb. 10, 2006); *Cf.* Comcast Corp. Form 10-Q filed Nov. 3, 2005 at 30 (reporting approximately 21.4 million subscribers), DirecTV Group, Inc. Form 10-Q filed Nov. 4, 2005 at 41 (reporting 14.9 million subscribers); Echostar Communications Corp. Form 10-Q filed Nov. 8, 2005 at 26 (reporting 11.7 million subscribers), and Time Warner, Inc. Form 10-Q filed Nov. 2, 2005 at 3 (reporting management of approximately 10.9 million subscribers).

[13] Media Business Corp., SkyTRENDS SkyMAP, August 2005; www.skyreport.com. TV Household Data from A.C. Nielsen.

[14] *See* Multichannel News, *DBS Rules Rural America*, Jan. 30, 2006, available at http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6303308.

[15] *In the Matter of Charter Communications, Five Petitions for Determination of Effective Competition in Seven Local Franchise Areas in Missouri*, CSR Nos. 6761-E, 6762-E, 6763-E, 6764-E, 6765-E, Memorandum Opinion and Order (rel. Feb. 7, 2006). *See also, e.g.*, *In the Matter of: Charter Communications; Eight Petitions for Determination of Effective Competition*

nonetheless thrived. With its upgrade investments nearly complete, Charter has had positive financial growth. For example, during the third quarter of 2005, Charter's revenues increased 5.6% and its net revenue generating units added almost doubled over the third quarter of 2004.[16]

If Charter can accomplish all of this – working with thousands of LFAs, investing billions to rebuild plant – within the Title VI franchising scheme and subject to direct competition, so can the ILECs. They have the financial means, the established customer base, and the wide-reaching political infrastructure necessary to navigate the local franchising waters.

## III. FRANCHISE REFORM MUST APPLY TO ALL PROVIDERS.

Charter's ability to secure thousands of franchises and invest billions of dollars to upgrade its system in a highly competitive environment rebuts the ILECs' claims for regulatory relief. If the Commission, nonetheless, adopts new rules that ease local franchising for new entrants, then the Commission should simultaneously address the local franchising burden on Charter and other cable operators.

In the NPRM, the Commission recognized that any consideration of the "reasonableness" of local cable franchise requirements must look at the requirements imposed on all cable

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*in Twenty-Three Local Franchise Areas in Michigan*, Memorandum Opinion and Order, 20 FCC Rcd. 11907 (2005) (noting DBS penetration of 41.4% to Charter's 40.1 % in Brooks, MI, DBS penetration of 38.5 % to Charter's 28.2 % in Dorr, MI, and DBS penetration of 28.3 % to Charter's 18.1 % in Wayland Township, MI); *In the Matter of: Mediacom Iowa, LLC*, Memorandum Opinion and Order, 20 FCC Rcd. 9111 (2005) (noting DBS penetration of 52.8% to Charter's 40.7% in Chewalah, WA).

[16] *See* Charter Reports Third Quarter 2005 Financial and Operating Results; Long-Standing CC VIII Dispute Resolved; Quarterly Revenues Increased by 5.6% to 1.318 Billion Driven by High-Speed Internet, available at http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=776266&highlight=.

operators, not just ILEC new entrants.[17] Charter agrees with that recognition. To the extent that the Commission is going to provide guidance or rules under Section 621(a) for new entrants, it needs to simultaneously provide guidance and standards on how the rest of Title VI will work. Otherwise, incumbent operators may be left in an economically unviable position that, as the National Cable Telecommunications Association's ("NCTA") evidence has shown,[18] will ultimately harm not only cable operators but consumers. Accordingly, the Commission should provide guidance to facilitate franchise modifications under Section 625 in response to new conditions created by any Commission action under Section 621.[19]

Congress recognized in the 1984 Cable Act that franchise obligations might need to be modified to "protect the heavy investment made by cable operators in a cable system."[20] Indeed, the 1984 Act was based in part on testimony to Congress about unreasonable LFA demands. Title VI, therefore, provides safeguards against LFA overreaching.[21] Title VI franchising is not

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[17] NPRM at ¶ 13.

[18] *See* NCTA Comments, MB Docket No. 05-255 at 16-24 and Attachment A (Sept. 19, 2005).

[19] Charter notes that it does not concede that the Commission has the authority to adopt rules under 47 U.S.C. § 541, and it reserves its right to further argue or dispute Commission jurisdiction in the future. However, to the extent that the Commission exerts such jurisdiction, then it should also exert jurisdiction to provide reform under other provisions of Title VI, such as Section 625.

[20] H.R. REP. NO. 98-934, at 26 (1984).

[21] "A significant purpose of [the 1984 Cable Act] is to *address the problems which have arisen in the franchise process*, and to provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems. *The legislation seeks to provide stability and certainty to the process of granting and renewing cable franchises*." H.R. REP. NO. 98-934, at 22 (1984) (emphasis added). Congress found that "the degree and detail of local regulation has increased and there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of ways." S. REP. NO. 98-67, at 6 (1983). Nonetheless, Congress also believed it important "that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." H.R. REP. NO. 98-934, at 24 (1984). To balance these concerns, Congress ultimately enacted the "important

the problem. Title VI is the remedy in the event of actual overreaching. Thus, for example, Section 625 permits the equipment and facilities requirements of a cable operator's franchise to be modified in the event of a "change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based." 47 U.S.C. § 545(f).

Charter undertook its multi-billion dollar investment in plant upgrades and franchise commitments with the reasonable expectation that the local cable franchising regime of Title VI would apply evenly to any other wireline entrant. A basic, underlying assumption of Charter's franchise undertakings and investment in its systems was that any new wireline entrant would be subject to a level regulatory playing field – meaning at least similar franchising processes and terms as are applicable to Charter. This assumption is codified in explicit level playing field laws in 16 states[22] and often in local ordinances. Title VI itself requires franchises, prohibits redlining,[23] and anticipates that providers will build out to "all households" within a reasonable period of time.[24] Moreover, Section 651 provides that if an ILEC is going to provide video programming to its customers, it "shall be subject to the requirements of this title. . . ."[25] Special

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uniform Federal standards" of the Cable Act to govern the franchising process and to keep LFAs in check. *Id.*

[22] *See* Alabama (Ala. Code § 11-27-2)(counties); California (Calif. Gov't Code § 53066.3); Connecticut (Conn. Gen. Stat. § 16-331(G)); Florida (Fla. Stat. Ch. 166.046(3); Georgia (O.C.G.A. § 36-90-5(a)), Illinois (55 Ill. Comp. Stat. 5/5-1095(E)(4)-(5) and 65 Ill. Comp. Stat. 5/11-42-11(E)(4)-(5); Michigan (MCLS § 484.3114(f)(h) (broadband); Minnesota (Minn. Stat. § 238.08, subd. 1(b)); Nevada (Nev. Rev. Stat. Ann. § 711.190(2)); New Hampshire (N.H. Rev. Stat. Ann. § 53-C:3-b(I)-(II); Ohio (Ohio Rev. Code Ann. § 1332.04(B); Oklahoma (Okla. Stat. Title. 11 § 22-107.1); Rhode Island (R.I. Gen. Laws § 39-19-3), South Carolina (S.C. Code § 58-12-80); Tennessee (Tenn. Code Ann. § 7-59-203); and Virginia (Va. Code Ann. § 15.2-2108(c)).

[23] 47 U.S.C. § 541(a)(3).

[24] 47 U.S.C. § 541(a)(4).

[25] 47 U.S.C. § 571(a)(3)(A).

FCC dispensation for ILECs to enter the cable business was never anticipated. In the words of the statute, unfranchised or lightly franchised ILEC entry would be a change in conditions which is beyond the control of Charter and the nonoccurrence of which was a basic assumption on which Charter's franchise commitments were based.

Indeed, Charter has invoked its rights under Section 625 several times when communities have granted new entrants franchises on less burdensome and more favorable terms. Other cable operators have done the same, recognizing that franchises granted on more favorable terms render the existing franchises unworkable.[26]

Like the Section 621(a) process, the standard Section 625 process requires a community-by-community approach, and frequently involves appeals and litigation.[27] If the Commission provides national guidance and standards under Section 621(a)(1), it should also provide national standards and guidance for the Section 625, so that Charter can "adapt to changes in market conditions."[28] Specifically, if the Commission takes any action in this proceeding to diminish or lessen the franchising obligations of ILECs and other new entrants, Charter respectfully requests that the Commission simultaneously find (1) that such an event was not reasonably foreseeable, (2) that such a change in conditions was beyond the control of existing cable operators, (3) that it was a basic assumption of existing cable franchise obligations that new entrants would be required to enter on a level playing field, and (4) that failure to amend an existing franchise in

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[26] *See, e.g., Cable TV Fund 14-A, Ltd, v. City of Naperville,* Case No. 96 C 5692, 1997 U.S. Dist. LEXIS 7736 (N.D. Ill. 1997).

[27] *See, e.g., Id.*; *Tribune-United Cable of Montgomery County v. Montgomery Co.*, 784 F.2d 1227 (4th Cir. 1986); *Cablevision Systems Corp. v. Town of East Hampton*, 862 F. Supp. 875 (E.D.N.Y. 1994), *aff'd* 57 F.3d 1062 (1995); *Storer Communications of Northern Kentucky, Inc. v. Boone County Fiscal Court*, No. 89-183 (E.D KY, Apr. 24, 1992).

[28] H.R. REP. NO. 98-934, at 71 (1984).

the face of competition free from similar obligations would render the franchise obligations commercially impracticable.

Ultimately, it would not be good policy to consider only a portion of the cable franchising regulatory scheme. The cable franchising regulatory structure is a complex and delicately balanced regime of local and federal regulatory requirements that has been developed over several decades, and has fundamental economic assumptions built in to its requirements. To amend one part of the regulatory regime, or to change its application to one set of providers but not others, will upset the balance of the rest of the regime and the economic assumptions that underlie investments by those entities that are currently operating within its construct. If the Commission believes that the franchising regime is fundamentally flawed, or no longer appropriate in current market conditions, then change should be proposed uniformly and probably through legislative action. Piecemeal changes based on the current business plans of the ILECs will only benefit the ILECs – not consumers or competition.

## IV. CONCLUSION

While Charter does not object to added competition, it respectfully submits that there is no record supporting the Commission's proposal to adopt rules under Section 621. As these comments demonstrate, the arguments of the ILECs are based on fallacies. Charter's own experience demonstrates the point. Charter, a major company, in very short order just a few years ago acquired cable systems serving over 4,000 communities. Many of those communities are small or rural. Yet, Charter invested billions of dollars to rebuild the plant to serve the entire communities, not just the wealthiest portions. And Charter did so while subject to vigorous competition and all within the confines of the existing local franchising regime.

If the Commission adopts rules, Charter submits that the Commission should simultaneously address the local franchising burden on existing cable operators that would result. The cable franchising regulatory scheme is a complex web of interrelated requirements. The Commission cannot make changes to one part of the scheme without causing significant ramifications to the entire scheme and those who are already subject to it. Granting ILECs and others entry free from the local franchising obligations that Charter faces would render Charter's obligations commercially impracticable, and the Commission should recognize that impact.

Respectfully Submitted,

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